



# United States Department of the Interior



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Park County Environmental Council  
PO Box 164  
Livingston, MT 59047

## **PROTEST DECISION**

### **DISMISSED**

#### **I. INTRODUCTION**

On December 14, 2017, a Lease Sale Notice for the Montana State Office (MSO), March 13, 2018, Competitive Oil and Gas Lease Sale was posted, which initiated a 30-day protest period. At the same time, the Butte Field Office (BFO) Oil and Gas Leasing Environmental Assessment (EAs), updated after a 30-day public comment period, was made available to the public.

In a letter to the Bureau of Land Management (BLM) dated January 11, 2018 (Enclosure 1), the Park County Environmental Council, on behalf of Montana Women For, Indivisible Upper Yellowstone, and the following Park County Residents, Ellen Winter, Vicki Van Buskirt, Charlotte Trolinger, Margaret Kidder, Margarita McClarty, Dixie Hart, Kim West, Karrie West, Linda Kenoyer, and Erica Lighthiser, (Protesters) submitted a timely protest to the inclusion of nine (9) parcels located in the BFO planning area, Montana.

#### **II. BACKGROUND**

Public scoping for this lease sale was conducted from August 15-29, 2017. This scoping period was announced in a press release issued by the Montana State Office. The BFO also posted National Environmental Policy Act (NEPA) notification log, reference number DOI-BLM-MT-L002-2017-0003-EA. In addition, the MSO mailed surface owner notification letters explaining the oil and gas leasing and planning processes. The letters requested written comments regarding any issues or concerns that should be addressed in the EA being prepared for the parcel. The Protesters did not submit scoping comments.

On September 30, 2017, the BLM Montana/Dakotas released the BFO Oil and Gas Leasing EA for a 30-day public comment period. The EA analyzed the potential effects from offering nine (9) nominated lease parcels in Montana containing 4,307 acres of Federal Mineral Estate in the March 13, 2018, Competitive Oil and Gas Lease Sale. Relevant public comments received during this process were addressed in the EA, as appropriate. The Protesters submitted comments on the EA regarding the best and highest value for the parcels, consultation with interested parties, historic and cultural resources, water resources, and environmental justice. The EA was updated and posted, along with the competitive sale list, on December 14, 2017, on the BLM's ePlanning website for a 30-day protest period.

After a careful review, BLM has decided to defer three BFO parcels due to potential environmental impacts presented in the EA and public comments. The Butte Field Manager recommended that six (6) parcels be included in the March 13, 2018 lease sale. As a result of the Decision Record, a total of six (6) nominated lease parcels (2,652 acres of Federal minerals) in the BFO planning area would be offered for lease at the MSO, March 13, 2018, Competitive Oil and Gas Sale with lease stipulations and/or lease notices as necessary for the proper protection and conservation of the resources associated with the lease issuances.

### **III. PROTEST ANALYSIS**

**Protest Summary:** The Protesters submitted a timely protest (via letter) dated January 11, 2018, to the inclusion of nine (9) parcels identified in the MSO, March 13, 2018, Notice of Competitive Oil and Gas Lease Sale.

#### **Protest Contentions and BLM Response:**

##### **I. The BLM's Environmental Assessment Violates the National Environmental Policy Act.**

The BLM's environmental assessment fails to comply with NEPA because it fails to take a hard look at environmental impacts and falsely concludes that further environmental analysis will be conducted as each parcel is proposed for leases. The BLM cannot delay analysis of impacts to the Application Permit to Drill ("APD") stage. Second, the BLM fails to analyze a reasonable range of alternatives. Third, the EA wrongly evaluates environmental justice data at the County level and fails to account for the fact that the city of Livingston is the poorest city in Montana. Fourth, the BLM fails to accurately estimate reasonably foreseeable development for the various lease parcels. Finally, the agency fails to assess the economic significance and economic impacts of oil and gas leasing in Park County, MT.

### **A. The BLM Improperly Defers Its Site-Specific NEPA Analyses of the Application Permit to Drill Stage.**

Residents in Park County, MT cannot "wait and see" for further environmental analysis to be conducted at the Application Permit to Drill ("APD") stage. *See*, Butte FO EA at 33 ("Any potential effects on water from the sale of lease parcels would occur at the time the leases are developed at the APD stage."); *Id.* at 25 (Any potential effects on air quality would occur if and when the leases are developed for oil and gas activities."); *Id.* at 30 ("Any potential effects on soils from the sale of lease parcels may occur at the time the leases are developed at the APD stage. The development of the leases would result in reasonably foreseeable disturbances to soils."); *Id.* at 36 ("Any potential effects on vegetation from the sale of lease parcels may occur at the time the leases are developed at the APD stage.")

"NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment." *U.S. Bureau of Land Mgmt. v. Kern*, 284 F.3d 1062, 1072 (9th Cir. 2002); *see also* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). This is especially the case if postponing analysis results in a piecemeal look at the impacts. *See* 40 C.F.R. § 1508.27 ("Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."). Finally, as noted above, NEPA provides that the BLM must assess three types of actions: (1) connected actions, (2) cumulative actions, and (3) similar actions. 40 C.F.R. § 1508.25. Connected actions "are closely related and therefore should be discussed in the same impact statement." Actions are connected if they, among other things: [a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id.*

Because drilling cannot occur without the BLM first leasing the minerals, leasing and drilling are interdependent, connected actions. Thus, the BLM must estimate the impacts of drilling these wells at the lease sale stage. Leasing also conveys a right to develop and is thus considered an irretrievable commitment of resources. NEPA requires that agencies prepare an EIS before there is "any irreversible and irretrievable commitment of resources." *See Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir. 1988). This means that once BLM reaches the APD stage, the agency cannot include additional stipulations to limit drilling, and further analysis at the APD stage would be too little, too late.

In sum, unless the BLM actually commits, through the imposition of a stipulation or stipulations, to conduct additional NEPA analysis at the drilling stage, it more often than not does not happen. This means that any commitment to address the impacts development of the proposed leases through subsequent NEPA is, at best, hollow, and at worst, a deliberate attempt to avoid accountability to addressing potentially significant, connected environmental impacts under NEPA.

### **BLM Response:**

BLM is tiering to and incorporating by reference all impacts from the 2009 BFO Resource Management Plan (RMP) and associated Final Environmental Impact Statement (FEIS). BLM completes an EA if a Finding of No Significant Impact (FONSI) can be supported, then there is no need for an EIS. In addition, surface disturbance is not part of the proposed action. At the time of this review it is unknown whether or not a particular parcel will be sold and a lease issued and what potential impacts to those resources may occur. The EA uses a Reasonable Foreseeable Development Scenario based on the RMP to estimate potential effects.

A detailed site-specific analysis and mitigation of activities associated with any particular lease would occur when a lease holder submits an application for permit to drill (APD). This could include re-evaluating the area for protected species and habitat, additional Conditions of Approval (COA) and involvement of external entities (e.g. USFWS), as necessary, based on the proposed action. The level of NEPA completed for future APDs (CX, DNA, EA, or EIS) would be based on site-specific considerations and the significance of effects.

At the leasing stage, site-specific drill locations are unknown. The BLM reviews proposed parcels and identifies stipulations based on what is known about the parcels such as presence of streams, wetlands, steep slopes, known nest sites, or designated habitat. These stipulations are essentially incorporated as design criteria in any future proposal. These stipulations were developed during the last RMP revision. Site-specific NEPA analysis cannot occur until there is an APD.

Upon receipt of an APD, the BLM would initiate a site-specific NEPA analysis that considers the direct, indirect, and cumulative effects of a specific action. At this time, detailed information about proposed wells and facilities would be provided for particular leases. In all potential exploration and development scenarios, the BLM would require the use of BMPs [Best Management Practices] documented in “Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development” (USDI and USDA 2007), also known as the “Gold Book.” The BLM could also identify APD COAs, based on site-specific analysis that could include moving the well location, restrict timing of the project, or require other reasonable measures to minimize adverse impacts (43 CFR 3101.1-2 Surface use rights; Lease Form 3100-11, Section 6, to protect sensitive resources, and to ensure compliance with laws, regulations, and land use plans. EA at 20.

### **B. The BLM Fails to Analyze and Assess a Reasonable Range of Alternatives.**

The BLM also fails to analyze and assess a reasonable range of alternatives to ensure that development is not speculative. *See High Country Conservation Advocates v. US. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014) (“The EA, while typically a more concise analysis than an EIS, must still evaluate the need for the proposal, alternatives as required by NEPA section 102(2)(E), and the environmental impacts of the proposed action and

alternatives."); *see also* 42 U.S.C. § 4332(E) (requiring agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources").

Because BLM admits that many of the proposed lease parcels may never see development, it appears the proposed leasing would simply be a major giveaway to the oil and gas industry. As it stands, of the 2,101,573 million acres of federal oil and gas under lease in Montana, only 710,617 acres are in production. Put another way, only a little more than 34% of all leased federal oil and gas acres in Montana are actually producing oil and gas. This raises serious questions over whether the proposed oil and gas leasing would simply allow industry to hoard more leases to strengthen their balance sheet while generating minimal, if not negative, revenue to the American public. With companies allowed to bid as low \$2.00 per acre for oil and gas leases and to pay only a nominal rental of \$1.50 per acre per year, it would seem that industry is poised to secure leases for rock bottom prices and use these leases to inflate their assets. All the while, taxpayers will have to pay the cost of BLM administration of the leases, any inspections and enforcement, and lose the opportunity for these public lands to be dedicated to higher and better uses.

While PCEC objects to the BLM's proposal to lease, given the situation, we at least request the agency give detailed consideration to alternatives that address the likelihood that industry is only seeking the proposed leases in order to stockpile reserves and not actually produce oil and gas. We request the BLM give detailed consideration to the following alternative actions:

In sum, because the BLM's proposed lease parcels are speculative, risky proposals, the BLM must ensure that the American public is fairly compensated for the costs of the lease sale and development by including alternatives with fiscal safeguards.

### **BLM Response:**

This EA tiers to the 2009 BFO Approved Resource Management Plan (ARMP) and associated FEIS. The FEIS for the ARMP identifies areas of low, moderate, or high development potential, and the ARMP made management decisions for areas open or closed to leasing. The ARMP also allows development of oil and gas resources and puts suitable constraints on these development activities. There is a large portion of the RMP area that has major constraints on activities (e.g., exclusion areas for wind or other rights-of-ways, no surface occupancy for oil and gas, etc.). This RMP was developed under the FLMPA and NEPA requirements and follows multiple use and sustained yield requirements. This lease sale analyzed and attached all the appropriate stipulations to allow both development of minerals and protection of resources.

The BLM analyzed all parcels in the EA to determine what stipulations from the RMP needed to be applied and if those stipulations are still adequate. The 2009 BFO RMP is a recent RMP and

analyses were done on the stipulations and management actions for all resources, using an up-to-date Reasonably Foreseeable Development Scenario. Since these parcels have stringent resource protections for all resources (NSO, CSU), and they followed the prioritization process, there was no need to analyze an alternative excluding such parcels (i.e., no environmental impact issues dictating a need to look at an alternative with fewer parcels).

### **C. The BLM Fails to Address Potential Impacts to Sensitive Bird Habitat.**

The EA fails to address whether these sites include habitat for BLM/State Species of Concern including Long-billed Curlews, Eagles, Northern Goshawk, Peregrine Falcon and other listed species. Many of proposed leases sites are adjacent to the Yellowstone River and serve as prime migratory bird habitat. Long-billed Curlews have been identified along the Yellowstone River on potential lease sites, as well as Eagles, Northern Goshawk, Peregrine Falcon and other species. The BLM should consider whether proposed lease sites are potentially significant habitat for species of concern, before auctioning leases for new oil and gas development.

#### **BLM Response:**

The leasing EA, Section 3.10, describes the Affected Environment for wildlife, including BLM Sensitive Bird Species and Migratory Birds.

Species designated as Sensitive by Montana BLM with potential to reside in or near the lease parcel areas are listed below.

**Birds** (migrants only not listed): bald eagle, black tern, Brewer's sparrow, burrowing owl, ferruginous hawk, golden eagle, greater sage-grouse, Lewis's woodpecker, loggerhead shrike, long-billed curlew, McCown's longspur, mountain plover, peregrine falcon, sagebrush sparrow, sage thrasher, Sprague's pipit, and veery. EA at 47-48.

Specific surveys for migratory birds have not been done in the lease parcels. The MT National Heritage Program maintains a database of known species observations. Based on habitats found in the parcels and results of Breeding Bird Survey (BBS) routes in the surrounding area (Sauer et al. 2017), examples of birds that could be expected to commonly occur include: vesper sparrow, killdeer, meadowlark, mourning dove, eastern kingbird, horned lark, black-billed magpie. Examples of birds that would be expected to occur although more rarely on the landscape would be: willow flycatcher, veery, loggerhead shrike, prairie falcon, gray catbird. EA at 48.

Upon receipt of an Application for a Permit to Drill (APD), the BLM would initiate a site-specific NEPA analysis that considers the direct, indirect, and cumulative effects of a specific action. Field surveys for wildlife and habitats would need to be included as a part

of this analysis. Such an analysis and surveys could lead to additional stipulations, mitigation measures, or changes to proposed actions to protect wildlife. EA at 50.

The following stipulations were applied to the lease parcels to mitigate any potential adverse impacts to BLM-Sensitive Bird Species.

#### NSO 11-44- BALD EAGLE NEST SITES

No surface occupancy or use is allowed within one-half mile of Bald Eagle nest sites and within Bald Eagle nesting habitat in riparian areas.

#### NSO 11-54- FERRUGINOUS HAWK NEST SITES

No surface occupancy or use is allowed within one-half mile of Ferruginous Hawk nest sites which have been active within the past five years.

#### NSO 11-7- PEREGRINE FALCON NEST SITES

No surface occupancy or use is allowed within one mile of identified peregrine falcon nesting sites.

#### TL 13-11- RAPTOR NEST SITES

No surface use is allowed within one-half mile of raptor nest sites which have been active within the past five years during the following time period: March 1 through July 31. This stipulation does not apply to the operation and maintenance of production facilities.

#### TL 13-26- BALD EAGLE NEST SITES

No surface use is allowed from February 1 through August 31 in a one-mile radius around Bald Eagle nest sites.

### **D. The BLM Fails to Address Potential Impacts to the Yellowstone River and Park County Resident's Water Supply.**

The EA fails to meaningfully evaluate any potential impacts to water quality or quantity impacts to the Yellowstone River, the City of Livingston and Park County residents. The EA acknowledges that "[w]ater resources in the area are essential to the residents for agriculture, public water supplies, industry, and recreation ... [and that] water resources and the corresponding riparian-wetland areas are crucial to the survival of fish and wildlife, including many BLM-sensitive fish, reptiles, birds, and amphibians," but fails to take actually address whether potential impacts from oil and gas development would impacts those water resources. Butte FO EA at 33.

The BLM does not satisfy its obligations under NEPA by listing reasons that water is important. The EA must analyze the potential impacts on our community's water and the Yellowstone River from the potential of oil and gas development. Potential impacts include water pollution from spills, erosion into riparian areas, and dewatering of local water sources. Impacts on drinking water from fracking have been well studied and BLM must acknowledge the level of risk to our community and to the Yellowstone River. *See* <https://www.epa.gov/newsreleases/epa-releases-final-report-impacts-hydraulic-fracturing-activities-drinking-water>

**BLM Response:**

No additional analysis is required at this time. As stated in Section 3.5 of the BFO leasing EA,

The act of leasing parcels would not cause direct or cumulative effects to resources because no surface disturbance would occur. The only direct effects of leasing are the creation of valid existing rights and impacts related to revenue generated by the lease sale receipts. Future lease exploration and development activities proposed through individual APD submission will be subject to future BLM decision-making and NEPA analysis. EA at 20.

Section 3.8 of the BFO leasing EA, Water Resources, states the following.

Offering nine parcels for lease would have no direct impacts on water resources including streams, wetlands, floodplains, or water bodies because no surface disturbance would occur. Any potential effects on water resources from the sale of lease parcels may occur at the time the leases are developed at the APD stage. EA at 38.

Analysis of potential impacts to water resources from future fluid mineral development was included in the EA. As stated in Section 3.8 of the EA, offering nine parcels for lease would have no direct impacts on water resources including streams, wetlands, floodplains, or waterbodies because no surface disturbance would occur. Consequently, there are no anticipated and unavoidable impacts to wetlands and streams as a result of the leasing of these parcels. During subsequent development at the APD stage, no surface disturbance would be allowed in wetlands, riparian areas, floodplains, rivers, streams, and waterbodies (NSO 11-2).

Oil and Gas drilling operations could impact available quantities of surface water and groundwater. The potential for impacts depends on the combination of water withdrawals and water availability at a given withdrawal location. Where water withdrawals are relatively low compared to water availability, adverse impacts are unlikely to occur. Where water withdrawals are relatively high compared to water availability, impacts are more likely. Compliance with state regulations would help mitigate the impacts of water withdrawals on surface and groundwater by ensuring that water rights are established for all beneficial uses of water,



ensuring that water resources are not over-appropriated, and considering the impacts of water withdrawals to groundwater wells and hydraulically connected surface waters.

The use of any specific water source on a federally administered well requires review and analysis of the proposal through the NEPA process, which will be completed at the APD stage. The Gold Book, Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development (BLM and USFS 2007), would be followed, and site-specific mitigation measures, BMPs, and reclamation standards would be implemented and monitored in order to minimize effects to water resources. All proposed actions must comply with local, state, and federal regulations, including Montana water laws.

Upon receipt of an APD, the BLM would coordinate with the appropriate Surface Management Agency (SMA) and initiate a site-specific NEPA analysis with public review opportunities to more fully analyze and disclose site-specific effects of specifically identified activities." At that time, alternatives would be considered and any additional mitigation would be identified to address potential future impacts that may arise in the site specific analysis. This analysis would include identification of any jurisdictional or non-jurisdictional wetlands and waterbodies/streams which may be impacted, corresponding mitigation, and requisite permits.

As required by Onshore Oil and Gas Order 1. III. D. 3. (b)., when submitting an APD to the BLM, the operator must include in the drilling plan "estimated depth and thickness of formations, members, or zones potentially containing usable water, oil, gas, or prospectively valuable deposits of other minerals that the operator expects to encounter, and the operator's plans for protecting such resources." It is up to the BLM Petroleum Engineer and/or the Geologist to analyze the information submitted to determine if the operator's plan to protect usable water is adequate. Approval of operator-submitted casing setting depths takes into consideration relevant factors such as, "presence/absence of hydrocarbons; fracture gradients; usable water zones; formation pressures; lost circulation zones; other minerals; or other unusual characteristics. All indications of usable water shall be reported." (OO2. III. B.) The surface casing is the only casing string with the requirement to cement to the surface. BLM considers the water zone in these wells to be protected by the surface casing and shale in which it is set and the top of cement and shale below the water zone.

The BLM's leasing recommendations for lands in the BFO were developed during the preparation of the BFO RMP which was a public process that involved public outreach including a meeting in Livingston. The Livingston parcels (MTM 108952-FT and MTM 108952-FU) have No Surface Occupancy stipulations for a variety of resource values along the Yellowstone River. Parcels farther from the river also have arrange of protective stipulations as well. In the event a proposal for surface disturbance or an APD is received, an EA will be developed which covers site specific issues related to the actual proposal. This process would involve a more specific proposal and would incorporate additional opportunities for public involvement.

The potential for impact to water resources is further reduced by the NSO stipulations already in place on Parcels FT and FU. Parcel FU has NSO stipulations for floodplains, streams, riparian areas, blue ribbon trout streams, Yellowstone cutthroat trout, National Historic Trails and NRHP. Parcel FT has additional stipulations (refer to Appendix A and B). The minimum size stipulations are applied to is a 40-acre aliquot part. Parcel FU is a 40 acre parcel; therefore the NSOs would cover the entire parcel. The NSOs would also cover most of parcel FT, including the portion in the source water protection area.

BLM reviewed the Livingston Source Water and Aquifer Protection Plan, Source Water Delineation and Assessment Report, and the boundaries of the Livingston city limits. We also contacted MT DEQ to obtain information regarding the groundwater recharge zones. Parcels FU and FT are outside the city limits and the recharge zones lie to the west of the Yellowstone River. Consequently, it is reasonable to assume that the Livingston municipal regulations do not apply to these parcels, even when considering the recharge zone. Documentation of this review is in the project record.

The following stipulations would mitigate any potential adverse impacts to water resources and fisheries.

#### NSO 11-2- NO SURFACE OCCUPANCY- RIPARIAN, FLOOD PLAINS, RIVERS, STREAMS AND WATER BODIES

No surface occupancy or use is allowed within riparian areas, 100-year flood plains of major rivers, and water bodies and streams, and to maintain riparian/wetlands function and water quality.

For the purpose of: To protect the unique biological and hydrological features associated with riparian areas, 100-year flood plains of major rivers, and water bodies and streams; and to maintain riparian/wetlands function and water quality.

#### NSO 11-20- BLUE RIBBON TROUT STREAM

No surface occupancy or use is allowed within one-half mile from the centerline of Class 1 fishery streams (Blue Ribbon Trout streams).

For the purpose of: To ensure healthy aquatic habitats are maintained along Class 1 fisheries.

#### NSO 11-48- YELLOWSTONE CUTTHROAT TROUT

No surface occupancy or use is allowed within one-half mile from the centerline of streams containing known populations of 90-100% pure Yellowstone Cutthroat Trout.

For the purpose of: To ensure healthy aquatic habitat exists in drainages important to the viability of Yellowstone Cutthroat Trout.

**E. The BLM Fails to address whether oil and gas development is the Best and Highest Value for the Proposed Parcels.**

Opening up public lands on the Yellowstone River to oil and gas development is not the highest or best use of America's public lands on the doorstep to Yellowstone. The BLM's mission is "to sustain the health, diversity, and productivity of America's public lands for the multiple use and enjoyment of present and future generations." The parcels under consideration in Park County lie adjacent to the Yellowstone River or its tributaries, including the Shields River. The Yellowstone River, the Shields River and the public lands in Park County sustain our local economy. People travel from around the world to fish our world-class trout streams, to visit America's first national park and to enjoy the rural character and mountain views that Park County provides. The proposed leases in Area 14 lie in the direct viewshed of Livingston's historic main street. The clean and cold water of the Yellowstone River and the unobstructed views of the Absaroka-Beartooth Mountains from downtown Livingston are worth far more than the annual estimated revenue of \$8500 to the BLM for leasing minerals (assuming maximum prices and 100% of the parcels are leased).

The BLM's alternative analysis should consider the economic impact of the No Action alternative. No action will cost the BLM approximately \$8500/year at best, but will preserve an economy that depends on intact natural resources, and sustains an outdoor economy. Park County, with its desirable public lands, crown jewel national park, and well-developed tourism infrastructure, captured \$196 million per year in tourism revenues. This represents approximately 2700 jobs in our County. PCEC and its members would be interested in contributing \$8500/yr to negate potential lost revenues from a No Action alternative.

**BLM Response:**

The BLM's multiple use and sustained yield mandate established in Federal Land Policy and Management Act of 1976 (FLPMA) and the planning goals set forth in the Butte Approved RMP/FEIS identifies conditions for permitted activities such as fluid mineral leasing in the context of balancing the need to provide for these uses with the need to protect natural and cultural resources. The BLM does not make NEPA-related resource management decisions based solely upon a parcel's economic value.

The lease terms and auction process for Federal minerals are designed to make possible responsible energy development. Parties awarded mineral leases must take steps to develop the leased minerals or they may forfeit the lease. The BLM cannot award leases to parties who do not plan upon energy development or accept money in exchange for not leasing a parcel.

**F. The BLM's evaluation of environmental justice is flawed because it Relies on County Data instead of City of Livingston Income Data.**

The BLM's analysis of environmental justice issues is flawed because it failed to account for the income level of residents in the City of Livingston. The City of Livingston faces the largest threat from oil and gas leases in Park County due to the potential development in Area 14. The City of Livingston is the poorest city in the state of Montana and the City of Livingston would be the most directly impacted by development of Area 14. The BLM relies on County-wide income data for the purpose of justifying the lack of any environmental justice analysis. The BLM should take a second look at whether socio-economic considerations for the City of Livingston require a more in depth environmental justice analysis.

**BLM Response:**

The county-level income and poverty statistics reported in the EA came from the US Census Bureau's Small Area Income and Poverty Estimates (SAIPE) analysis (see <https://www.census.gov/programs-surveys/saipe.html> for more information). The SAIPE estimates of household income are available at the state and county level, which we believe is sufficient detail for identifying low-income populations.

The US Census Bureau's American Community Survey (ACS) includes population income estimates for the city of Livingston and also Park County Montana. Comparing the 2016 ACS 5-year estimates for Livingston MT with those for Park County MT, there is no statistically-significant difference in the mean income, median income, and the percentage of households in each income-range. (See [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_16\\_5YR\\_S1901&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_S1901&prodType=table) for the ACS city- and county-level estimates and <https://www.census.gov/programs-surveys/acs/guidance/statistical-testing-tool.html> for a spreadsheet which evaluates the statistical significance of ACS estimates.)

Given these results, we believe that the county-level income and poverty statistics reported in the EA are sufficient for our purposes.

**G. The BLM Fails to Account for the Impacts to the City of Livingston's Historic and Cultural Resources**

The City of Livingston has several local groups that preserve historic and cultural resources in Livingston's historic downtown. The EA completely ignores the potential historic and cultural impacts from oil and gas development in Livingston's historic viewshed.

The EA also fails to consider potential cultural and historic sites on BLM lands. Park County's rural landscape is full of history and contains many significant Native American sites.

### **BLM Response:**

In the event these parcels are leased, and a specific proposal for exploration is received, the BLM will consider potential impacts to identified historic properties and apply appropriate stipulations to avoid or reduce impacts associated with the approval of an APD. Potential adverse impacts to cultural and historic resources were analyzed and disclosed in the leasing EA, Section 3.11, Cultural Resources

Offering the parcels for lease would have no direct, indirect, or cumulative impacts on cultural resources because no ground disturbance would occur. Any potential effects from the sale of leases would occur at the Application for a Permit to Drill (APD) stage when the parcels are developed. Potential site-specific effects would be addressed in detail in a subsequent NEPA analysis when an APD is submitted. The direct, indirect, and cumulative impacts from fluid mineral development on cultural resources are discussed in Chapter 4 of the Butte Final EIS (USDI-BLM, 2008) and are incorporated by reference into this EA. EA at 51.

The Lewis and Clark National Historic Trail (L&CNHT) marks the path of the Corps of Discovery, or the Lewis and Clark Expedition, on their expedition to the Pacific Ocean. The return trip of William Clark with twelve other members of the Corps of Discovery is that part of the trail crossing lands managed by the Butte Field Office of the BLM. The trail through Park County is in and along the Yellowstone River. The centerline of the L&CNHT is considered the river, with a ½ mile buffer applied by stipulation NSO 11-26. Maps of National Historic Trail buffers and lease parcels are in the administrative record. EA at 51.

Leased parcels are subject to CR 16-1 (NHPA compliance), and LN 14-2 (Cultural Inventory Requirement), which allows for identification and avoidance of sites through project re-design. Cultural resources identified through this stipulation would be avoided or evaluated for the NRHP. Any eligible site, or site for which a clear eligibility determination cannot be obtained, and which cannot be avoided, may become subject to Stipulation NSO 11-120 (No Surface Occupancy). The L&CNHT is protected through the application of NSO 11-26 (No Surface Occupancy).

### **CR 16-1- CULTURAL RESOURCES LEASE NOTICE**

This lease may be found to contain historic properties or resources protected under National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act (42 U.S.C. 1996), Native American Graves Protection and Repatriation Act (25U.S.C.

3001 et seq.), Executive Order 13007 (May 24, 1996), or other statutes and executive orders. The BLM will not approve any ground-disturbing activities that may affect any such properties or resources until it completes its obligations (e.g., state historic preservation officer and tribal consultation) under applicable requirements of the NHPA and other authorities. The BLM may require modification to exploration or development proposals to protect such properties, or disapprove any activity that is likely to result in adverse effects that cannot be successfully avoided, minimized, or mitigated.

#### CSU 12-8- CULTURAL OR PALEONTOLOGICAL LOCALITIES INVENTORY

Surface occupancy or use is subject to the following special operating constraints: Prior to surface disturbance, an inventory of the leased lands may be required to determine if cultural resources or paleontological localities are present and to identify needed mitigation measures. Prior to undertaking any surface-disturbing activities on the lands covered by this lease, the lessee or operator shall:

1. Contact the surface management agency (SMA) to determine if a cultural or paleontological resource inventory is required. If an inventory is required, then:
2. The SMA will complete the required inventory; or the lessee or operator, at their option may engage the services of a cultural resource consultant acceptable to the SMA to conduct a cultural resource inventory of the area of proposed surface disturbance. The operator may elect to inventory an area larger than the planned disturbance to cover possible site relocation or for planning purposes.
3. Implement mitigation measures required by the SMA. Mitigation may include relocation of proposed lease-related activities or other protective measures such as data recovery and/or extensive recordation.
4. The SMA will consult with Native American tribes per IM 2005-003.

The lessee or operator is required to bring to the attention of the field office manager any cultural resources or other objects of scientific interest discovered as a result of approved operations under the lease and shall leave all discoveries intact and undisturbed until directed to proceed by the field office manager (16 U.S.C. 470).

#### LN 14-2: CULTURAL RESOURCES

The Surface Management Agency is responsible for assuring that the leased lands are examined to determine if cultural resources are present and to specify mitigation measures. This notice would be consistent with the present Montana State Office guidance for cultural resource protection related to oil and gas operations (NTL-MSO-85-1).

#### NSO 11-26- NATIONAL HISTORIC TRAILS

No surface occupancy or use is allowed within one-half mile of designated National Historic Trails.

The BLM Visual Resource Management (VRM) Policy only applies to BLM surface. Based on the Best Management Practices (BMPs), Required Design Features and Conditions of Approval and existing stipulations, potential impacts from oil and gas development would be low. Any site-specific impacts would be addressed at the APD stage of development. Development activities on all parcels located on BLM surface would be mitigated so that contrasts conform to VRM class guidelines. Oil and gas development activities on private surface would be guided by BMPs and other resource mitigation measures.

Should any new oil and gas development occur, it would be subject to BLMs' BMPs for VRM in order to minimize contrasts to the existing landscape. This includes proper site selection, minimizing disturbance, selecting color schemes that blend with the background, and reclaiming areas that are not in active use. Overall, the goal is to minimize impacts to the existing visual resources that currently exist and to ensure conformance with the VRM class of the area.

#### **H. The BLM Failed to meaningfully consult with interested parties, including the City of Livingston.**

The BLM's analysis is flawed because BLM failed to meaningfully engage with interested parties, including the City of Livingston. When considering whether to develop oil and gas leases adjacent to a community, the BLM should proactively work to inform and engage a community. BLM failed to provide adequate notice to potentially impacted communities and landowners, including the 6,000(+) residents of Livingston and its local government. The public interest weighs in favor of informing more people of potential impacts to air and water. The BLM should reopen the scoping period and should meaningfully engage with landowners and community members through public meetings and presentations at local government.

#### **BLM Response:**

On August 11, 2017, scoping letters were mailed to split-estate landowners, surface management agencies and tribal representatives. The MSO issued a press release on August 14, 2017 for the 15-day public scoping period. The MSO also issued a press release on September 29, 2017 for the 30-day public comment period as part of the lease sale NEPA process. Scoping and 30-day comments were addressed and changes were made to the EA, as appropriate.

Section 4.2 of the leasing EA states, "The following tribes, organizations and agencies were consulted during the preparation of this document." EA at 62.

**Government/Agencies:**

- Montana Fish, Wildlife, and Parks, Butte Area Resource Office, Bozeman, MT
- Montana DNRC, Trust Land Management Headquarters, Helena, MT
- Park County Board of County Commissioners, Livingston, MT
- Bureau of Indian Affairs; US Dept. of Interior
- Bureau of Reclamation, Billings, MT
- Dept. of Homeland Security; Border Patrol Facilities & Tactical Infrastructure, Washington D.C.
- Montana Historical Society, Helena, MT
- National Park Service, Denver, CO
- US Army Corps of Engineers, Omaha, NE
- US Customs and Border Protections, Washington D.C.
- US Fish and Wildlife Service, Denver, CO

**Tribes**

- Blackfeet Tribal Business Council, Browning, MT 59417
- Chippewa Cree Tribe, Box Elder, Mt. 59521
- Confederated Salish and Kootenai Tribe. Pablo, MT 59855
- Crow Tribe, Crow Agency, Montana
- Fort Belknap Indian Community, Harlem,
- Ft. Peck Tribes, Poplar, MT
- Northern Cheyenne Tribe, Lame Deer, MT

**II. The Proposed Leases Appear to violate the Mineral Leasing Act.**

The BLM's proposed leasing in Park County runs afoul of the MLA in two key regards. First, it does not appear that most of the lease parcels contain lands that are known or believed to contain oil or gas deposits. Second, it does not appear that there is any intent of any lessee to diligently develop many of the proposed parcels.

On the first matter, the Mineral Leasing Act allows leasing only where there are lands that are "known or believed to contain oil or gas deposits." 30 U.S.C. § 226(a). Here, it unclear whether all of the lease parcels include lands that are known or believed to contain oil and gas deposits.

At a minimum, the BLM has a duty to confirm where lands proposed for leasing are known or believed to contain oil and gas deposits. Here, the agency appears to have undertaken no such diligence in confirming whether the oil and gas industry's supposed interest in the proposed lease parcels is rooted in the existence or believed existence of oil and gas deposits.



On the second matter, the BLM cannot lease lands for oil and gas development if there is no intent to diligently develop. As it stands, there is no basis for concluding that the lands proposed for leasing are known or believed to contain oil and gas deposits, or that there is any intent to diligently develop any of the proposed leases. Accordingly, the BLM is not legally justified under the Mineral Leasing Act in proceeding with the proposed leasing and the March lease sale must be canceled.

### **BLM Response:**

The method used to determine a potential Reasonably Foreseeable Development scenario for the lease sale is outlined in Section 3.2 of the EA. The 2009 BFO RMP and associated FEIS lists the proposed counties within a development potential, which demonstrates the presence of oil and gas deposits within the respective counties.

Low development potential does not indicate the absence of oil and gas in the area. There are numerous factors that contribute to development potential in an area. As stated in Section 3.2 of the EA, "These well numbers are only an estimate based on historical drilling, geologic data, resource expertise, and current development in the area." EA at 11.

Leases are issued in accordance to Federal laws, regulations, and policy. The 2009 BFO ARMP did not designate the parcel lands under review as closed to oil and gas leasing; therefore, BFO applied the necessary RMP approved stipulations to the respective lease parcels, which include stipulations associated with resources and resource uses identified in the 2009 BFO ARMP. See EA Appendix A.

It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional, and local needs. This policy is based on various laws, including the Mineral Leasing Act of 1920 and FLPMA. The Federal Onshore Oil and Gas Leasing Reform Act of 1987 Sec. 5102(a)(b)(1)(A) directs the BLM to conduct quarterly oil and gas lease sales in each state whenever eligible lands are available for leasing.

- 43 C.F.R. § 3120.1-2

Each proper BLM State Office shall hold sales at least quarterly if lands are available for competitive leasing.

- Mineral Leasing Act of 1920 as amended- Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA)

Lease sales shall be held for each State where eligible lands are available at least quarterly....

- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform

State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing.

- Montana State Office Oil and Gas Leasing Reform Implementation Plan August 2010

All Montana Oil and Gas Competitive Lease Sales are subject to the following laws, regulations and policies: Required by law and regulation to hold lease sales at least quarterly if lands are available (Public Law 100-203, Sec. 5102, dated 12/22/87 (FOOGLRA)).

#### **IV. CONCLUSION**

The Protesters requested that the BLM withdraw nine (9) parcels from the MSO, March 13, 2018, Competitive Oil and Gas Lease Sale. The Protesters contend that 1) the leasing EA violates NEPA, 2) BLM improperly defers site-specific NEPA to the APD stage, 3) fails to consider a reasonable range of alternatives in the EA, 4) fails to consider potential impacts to sensitive bird habitat, water resources, and cultural resources, 5) fails to address whether oil and gas development is the best and highest value for the parcels, 6) BLM's evaluation of environmental justice is flawed, 7) BLM failed to consult with interested parties, and 8) BLM appears to have violated the MLA.

The BLM Montana State Director has decided to defer three (3) BFO lease parcels from the MSO, March 13, 2018, Competitive Oil and Gas Lease Sale. The protest of these three lease parcels is dismissed as moot. The protest of the other six (6) BFO parcels is dismissed for the reasons stated above.

#### **The BLM dismisses this protest for the reasons stated above.**

The BLM, in accordance with existing regulations and policies, will defer leasing actions on lease parcels MTM 108952-FR, MTM 108952-FT, and MTM 108952-FU. The BLM will offer for lease the other six (6) protested parcels as described in the MSO, March 13, 2018, Notice of Competitive Oil and Gas Lease Sale.

#### **Administrative Review and Appeal**

This Decision may be appealed to the Interior Board of Land Appeals (IBLA), Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. § 4 and Form 1842-1 (Enclosure 2). If an appeal is taken, the Notice of Appeal must be filed in the Montana State Office at the above address within 30 days from receipt of this Decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay of the effectiveness of this Decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for stay must be submitted to the IBLA and the appropriate Office of the Solicitor (see 43 C.F.R. § 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

#### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;
3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

/s/ Donato J. Judice

Donato J. Judice  
Deputy State Director  
Energy, Minerals, & Realty

#### 2 Enclosures

- 1- PCEC Protest Letter Dated January 11, 2018 (11 pp)
- 2- Form 1842-1 (2 pp)